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SUPREME COURT OF THE UNITED STATES
1974-75 TERM

No. 75-395

Lawren V. Schumaker vs. Maynard Sommer, Robert N. Cable, Henry Greek, Derald D. Thompson, Richard McKee and Emil Brei. State of South Dakota, Acting by and through the Department of Transportation for the Division of Highways, Applicant for Intervention,

Petitioner

-vs-

Lawren V. Schumaker,

Respondent.

and

Darlene Schumaker vs. Maynard Sommer, Robert N. Cable, Henry Greek, Derald D. Thompson, Richard McKee and Emil Brei. State of South Dakota, Acting by and through the Department of Transportation for the Division of Highways, Applicant for Intervention,

Petitioner

-vs-

Darlene Schumaker,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the State of South Dakota, acting by and through the Department of Transportation for the Division of Highways, respectfully prays that a Writ of Certiorari be granted to review the Opinion and Order of the United States Court of Appeals for the Eighth Circuit which Opinion and Order were filed on June 14, 1975.

OPINIONS BELOW

The Opinion of the District Court was entered on December 16, 1974, and Order entered thereon on December 20, 1974. The District Court Opinion is reported at 386 F.Supp. 618 (1974). Attached is a copy thereof in Appendix A.

The Opinion of the Court of Appeals for the Eighth Circuit was rendered June 19, 1975, and is not reported yet._____F.2d _____(1975) (Nos. 75-1070 and 75-1071) Attached is a copy thereof in Appendix B.

JURISDICTION

The judgment of the Court of appeals was filed on June 19, 1975. (Appendix B) The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Eighth Circuit erred in denying Petitioner the right to intervene in these actions as the real party in interest and in applying South Dakota law relative thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Article IV, Sec. 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

U.S. Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Consitution, Amendment XI:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

These cases are consolidated for purposes of appeal and Petition for Writ of Certiorari. These cases arise from an automobile accident. Respondents are residents of California. Respondents brought two diversity actions against six employees of the State of South Dakota, Department of Transportation, Division of Highways, alleging said employees had a governmental duty to construct, maintain and improve said highway in question and to keep it reasonably safe for travel, and as a result of their negligence in failing to perform this duty, the accident occurred. Respondents' Complaints allege said six employees are governmental officials having governmental duties and are being sued for improperly performing these governmental duties.

Petitioner moved to intervene as a matter of right as the real party in interest, instead of the six named Defendants. Simultaneously, Petitioner moved for dismissal of Respondents' Complaints for want of Federal Jurisdiction. The Federal District Court entered an Order denying intervention. The

United States Circuit Court of Appeals, Eighth Circuit, affirmed the decision of the District Court denying intervention.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

Intervention is sought pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure as a matter of right. Petitioner, State of South Dakota, asserts it has an interest relating to the property or transaction which is the subject of these actions and that it is so situated that the disposition of these actions would as a practical matter impair or impede its ability to protect that interest unless it is represented in these actions.

Petitioner is the real party in interest, pursuant to Rule 17 of the Federal Rules of Civil Procedure, and as such qualifies it as an intervenor as a matter of right pursuant to Rule 24(a)(2).

Respondents are attempting to circumvent the sovereign immunity of Petitioner and the agents and servants of Petitioner when they are performing their governmental functions or duties in the course of their employment. This is further evidenced by Respondents having availed themselves of the remedy in South Dakota for claims against the State pursuant to South Dakota Compiled Laws 21-32 in case they do not prevail in these actions.

It is a well settled doctrine that parties named in a suit may be nominal and that the court should seek to determine the real parties in interest, *Chicago Stadium Corporation* vs. *State of Indiana*, 123 F.Supp. 783 (1954), *State of Nevada* vs. *Reynolds Electrical and Engineering Company*, 272 F.Supp. 942 (1967). The issue of the real party in interest becomes of utmost importance when the Eleventh Amendment has bearing on the jurisdiction of the court. This principle as stated in numerous cases might be best summarized in "that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record." *Ex parte Ayres*, 123 U.S. 443, 31 L.Ed. 216, 8 S.Ct. 164 (1887). This case goes on to say:

> The state not being a party on the record, and the Court having jurisdiction, over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants, – whether they are to be considered as having a real interest, or as being only nominal parties.

The *Ayres* case, citing *Governor of Georgia* vs. *Madrazo*, 26 U.S. 110, 1 Pet. 110, 7 L.Ed. 73 (1828), further points out that in the instance of a suit against a governor, he is sued "not by his name but by his title." The demand made upon him is not made personally, but officially, see also 36 C.J.S. Federal Courts, Sec. 50(1) at 251.

It is further submitted that, in considering the nature of these suits, a suit against an officer of the State in his official capacity is a suit against the State and the State is the real party in interest. *Ford Motor Company* vs. *Department of Treasury*, 332 U.S. 459, 89 L.Ed. 389 (1945).

There is an obvious effort to name the lower echelon of the governmental chain of command and eliminate the Board of Transportation and the State of South Dakota, which are the ultimate decision makers in the chain of command on the governmental duty to construct, maintain and repair highways. S.D. Constitution, Article XIII, Sec. 9 and S.D.C.L. 31-4-14.

In a similar suit, parallel to these actions as to parties in interest, the Federal District Court in *Peter Kiewit Sons Co.* vs. *South Dakota State Highway Commission*, 269 F.Supp. 333 (1967) established criteria for determining the real party in interest. Those criteria in that case included: (1) an analysis of the state legislation creating the Commission, (2) an analysis of the powers and duties of the Commission, and (3) a determination of substance of the suit as opposed to form.

The *Kiewit* decision, supra, contained in it sound precedent for the determination of substance of such a suit involving the broad subject matter of suits involving the relationship between

highway authorities and individuals associated with them. For example, in *Delong Corporation* vs. *Oregon State Highway Commission*, 233 F.Supp. 7 (1964) the Court also analyzed legislation creating the political entity, the powers and duties legislatively granted to it, and the question of substance over form.

Both of the above decisions held that where a suit is brought against named individuals as members or officers of highway commissions, the suit was in essence one against the state wherein they operated and from whom they derived their powers. Although the cases at hand did not specifically name highway commissions, the principles presented in both cases do present certain guidelines for the determination of the real party in interest, as the Commissions or Board Members are the ultimate authority in the State's duty to maintain highways.

A working checklist of more finite tests is presented in *Krisel* vs. *Duran*, 258 F.Supp. 845 (1966). Although in this case the court holds that none of the tests is conclusive, it does present certain tests, some of which the Petitioner asserts are key tests in the cases at hand. It is to be noted that some of these same tests are those applied in the District Court's memorandum decision as found in more recent precedents and which Petitioner asserts were inappropriately applied. Those tests of paramount importance to the issues at hand include: (1) whether payment of the judgment will be made out of the State treasury, (2) whether the agency is performing a governmental or proprietary function and (3) whether it has the power to sue or be sued.

With the three broad criteria for analysis set forth in the *Kiewit* and *Delong* decisions, supra, and the more definite tests of the *Krisel* decision, supra, it becomes necessary to look at the uniqueness of the cases at hand as they relate to South Dakota constitutional and legislative authority to construct, maintain and improve highways in South Dakota.

Article XIII, Sec. 9 of the Constitution of South Dakota emphasizes the State's responsibility for construction, maintenance and improvement of highways:

> The construction and maintenance of good roads and the supplying of coal to the people of the state from lands belonging to the state are works of necessity and importance in which the state may engage but no expenditure of money for the same shall be made except by the vote of a two-thirds majority of the Legislature.

In other words, Petitioner asserts that only the State of South Dakota can be engaged in construction and maintenance of highways. There is no constitutional mandate granted nor permission given for anyone other than the sovereignty to be engaged in this activity on behalf of the public. The duty to construct or maintain highways cannot lie with anyone in an individual capacity. Anyone performing those functions would be acting either as an agent for or servant of the State of South Dakota.

To carry this constitutional authority further, the duty to construct and maintain highways has been legislatively vested in the State Highway Commission (now referred to as the Board of Transportation), a body determined in the *Kiewit* dicision, supra, to be an arm of the sovereignty. South Dakota Compiled Laws 31-4-14 state:

> All marking, surveying, construction, repairing and maintenance of the state trunk highway system shall be under the control and supervision of the state highway commission, and the commission shall be charged with the administration of the laws relative thereto.

Another State statute has a bearing on the analysis of who is the real party in interest and the right to protect one's interests for purposes of intervention such as in the cases at hand. That statute is Chapter 3-19 of the South Dakota Compiled Laws. In the event suit is brought against an office or employee exercising his official duties or responsibilities, he is to be indemnified by the State, up to three thousand dollars, for costs

involved, including judgment. Excess amounts may be presented as a claim to the legislature. Therefore, the State does have a financial interest in litigation brought against its officers and employees and as such becomes the real party in interest; see *Jaffe, Suits Against Governments and Officers: Damage Actions,* 77 Harvard Law Review 2 (December 1963).

To draw this argument to its conclusion in light of the criteria and tests hereinbefore set forth, one must bear in mind that individual agents and servants of sovereigns are named Defendants in the cases at hand. However, it is apparent that the same criteria apply to the determination of their status as were used in the cited authorities.

It is the State of South Dakota that is constitutionally permitted to engage in the governmental functions of constructing and maintaining roads, not individuals. The legislature has placed the responsibility for performing those functions with the State Highway Commission as an arm of the sovereignty, not with individuals in an individual capacity. Those powers and duties are specifically defined by statute. The substance of the Complaints is to recover damages for alleged negligence on the part of servants and agents of the sovereignty who were acting in such a capacity and performing only that duty which the sovereignty has been constitutionally and legislatively authorized to perform.

Payment of the judgment would be payable from the State treasury by virtue of a State indemnification statute for the benefit of officers and employees exercising their official duties and responsibilities. The function of constructing and maintaining highways is governmental in nature as opposed being proprietary.

In reviewing an analysis premised upon these criteria and tests, Petitioner asserts that these suits are in substance suits against the sovereign State of South Dakota.

Rule 17 of the Federal Rules of Civil Procedure provides that actions are to be brought in the name of the real party in interest. It is well settled that this applies to Plaintiffs as well as

Defendants so the issue basically focuses to the determination of the capacity in which the employee acts. Section (b) of Rule 17 specifically provides that capacity is to be determined by the law of the domicile of the party in question.

South Dakota statutory law specifically delineates this relationship. South Dakota Compiled Laws 59-6-9 says:

> Unless required by or under authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business; and for his willful omission to fulfill the obligation of the principal.

In addition to the above statutory law applicable to all agency relationships, the South Dakota Supreme Court has addressed this specific issue as it relates to public officers or employees. In *Plumbing Supply Co.* vs. *Board of Education,* 32 S.D. 270, 142 N.W. 1131 (1913) the South Dakota Court held that where a school district officer performs his duties and is acting in a political capacity he is not liable for negligent acts or omission unless the State Legislature has specifically provided for, or consented to, such suit, at 1132.

In *Jerauld County* vs. *St. Paul Marine Indemnity Co.,* (S.D.) 71 N.W.2d 571 (1955) the South Dakota Supreme Court held no action exists against the County for negligence of its officers.

In *Defender* vs. *City of McLaughlin, et al,* (D.C. S.D. 1964) 228 F.Supp. 615, it was held that a suit against the city and a city police officer was within immunity of the city and Summary Judgment was granted. The Federal Court relied upon the state case of *Jerauld County* vs. *St. Paul Marine Indemnity Co.,* supra.

In *Loonan Lumber Co.* vs. *Wannamaker,* (S.D.) 131 N.W.2d 78 (1964) the issue of a governmental employee performing governmental functions in the course of his employment was

not present. In *Dohrman* vs. *Lawrence County, et al,* (S.D.) 143 N.W.2d 865 (1966) in a suit against the County and the county highway superintendent in his official capacity, the South Dakota Supreme Court stated the county highway superintendent's liability was subject to the same sovereign immunity as the County. This case rules in the question presented in Respondents' Complaints herein, where a governmental employee is performing a governmental function in the course of his employment.

Again, in *Conway* vs. *Humbert, et al,* (S.D.) 145 N.W.2d 524 (1966) in a suit against two firemen and the City of Sioux Falls, the South Dakota Supreme Court upheld the dismissal of the action on the grounds of immunity from liability of the City for negligence of its employees when engaged in governmental functions. Negligence of the employees was conceded in this case. The Court again stated it was the Legislature who must waive immunity from tort claims, if it is to be waived.

In *Shaw* vs. *City of Mission,* (S.D.) 225 N.W.2d 593 (1975) the South Dakota Supreme Court again upheld sovereign immunity of the City for alleged negligent acts of its policemen in making an arrest.

There is no statutory permission to sue nor a waiver of immunity by the State of South Dakota where agents and employees of the sovereignty are in performance of duties relating to the construction, maintenance or improvement of highways.

This is borne out by the fact that the State of South Dakota honors sovereign immunity and this doctrine has been upheld in more recent decisions of the South Dakota Supreme Court. This law of the domicile has a direct bearing on the manner in which these suits have been brought. Each time the question has been considered, the South Dakota Supreme Court has relied on Article III, Section 27 of the South Dakota Constitution which, as paraphrased, provides that the Legislature is to direct by what manner suits may be brought against the State. The Legislature has provided a claims process, South Dakota

Compiled Laws 21-32. The Respondents have filed a claim in addition to the suits at hand, alleging negligence by the State of South Dakota in designing and constructing the highway whereon the accident, which is the subject of these suits, occurred. It is obvious that the Respondents are attempting, to accomplish indirectly that which they could not do directly, which is to circumvent the State's sovereign immunity. It is the Petitioners position that this is the essence of the cases at hand and that as such the manner in which they were brought does not reflect the law of the domicile as required by Rule 17 of the Federal Rules of Civil Procedure.

By reference to the Complaints, Petitioner emphasizes the manner in which the suits were brought against the six named Defendants. In each paragraph of the respective Complaints the Defendant is named, his master or principal is named, and it is alleged that in such capacity he had certain governmental responsibilities, the abrogation of which allegedly caused the injuries.

Furthermore, the Complaints do not allege that the named Defendants acted outside the scope of their official duties or in the performance of some individual duty as opposed to one governmental in nature. Petitioner asserts that the pleadings, standing by themselves, necessarily imply that any alleged negligence was committed by the named Defendants in an official capacity in the performance of a function in which only the State of South Dakota could be engaged.

It is necessary for the State to be a party in these actions to uphold its sovereignty as declared by its constitution, statutes and the Supreme Court and to protect the public interest which could be affected by these actions. If the decision of the Eighth Circuit Court of Appeals is allowed to stand, sovereign immunity as defined under South Dakota law would be waived in Federal diversity actions. This presents an equal protection question under the Federal Constitution, as the citizens of South Dakota would be treated different than citizens of other states. (U.S. Constitution, Article IV, Sec. 2, and Tenth

Amendment of the U.S. Constitution.) It is urged that only the state is so situated so that as a practical matter it can represent the interests adverse to those of the Respondents.

Under Rule 24(a)(2) there are three tests which must be met by a party seeking intervention, namely: (1) an interest in the subject matter of the action, (2) the disposition of that action may as a practical matter impair or impede his ability to protect that interest, and (3) that the intervenor is not adequately represented.

Petitioner asserts that the case of *Nuesse* vs. *Camp*, 128 App. D.C. 172, 385 F.2d 694 (1967) presents a working analysis of what is necessary for a state to intervene while meeting the standards of Rule 24(a)(2). It was held that where a state official was directly concerned in effectuating the state policy that he, as an officer of the state, was entitled to intervene as having an interest in the subject matter of the action. It is submitted that a similar situation exists in the cases at hand. Where the State of South Dakota and its highway commission are constitutionally permitted and legislatively authorized, exclusively, to be engaged in the construction, maintenance and improvement of highways, those functions are the effectuating of a state policy and the state therefore has an interest in the subject matter of the suit. The effectuation of the state policy is to build and maintain highways as the framers of the state consitution and subsequent legislatures intended.

The *Nuesse* case, supra, also addresses the issue of what constitutes impairment of that interest as a practical matter. A unique application of the rule of stare decisis is applied: if, in the intervenor's absence, a decision were rendered which was contrary to his position, then he may by virtue of the rule be prohibited in seeking relief in another court. Although the effect of intervention in the cases at hand would invoke the immunity available to South Dakota in Federal District Court by virtue of the Eleventh Amendment, there are serious and complicated relationships stemming from South Dakota's position as an employer. These relationships point out a definite

constitutional and legislative pattern for the performance of a governmental function. Further, the Complaints acknowledge this relationship by the manner in which the suit was brought. It is submitted that if intervention is not allowed there would be established such a precedent so as to have the practical effect of nullifying the performance of the governmental function of constructing, maintaining and improving highways delegated to the state as a sovereignty, its officers and employees by that document which created the sovereignty itself.

The third test applied by the *Nuesse* case, supra, involves that of representation. In addressing whether or not the named parties represented the intervenor's interests, the court held that the burden for showing adequacy of representation fell upon those opposing it. That point aside, intervention was allowed the state official on behalf of the state on the grounds that he represented "overriding and broader state interests". It was further recognized that the position of the intervenor was so situated to better represent the interests of the state. In the cases at hand, it is submitted that the interests of the state lie in the construction and maintenance of highways which its constitution permits and which its statutes specifically delegate to its various officers in an official capacity. In placing itself in such a position the state has not foreclosed recourse for wrongs that may be committed in its behalf and the Respondents have recognized this as evidenced by their efforts to seek recourse by alternative statutory methods. Rather, by being the real party in interest, and by the nature of the governmental function of providing highways to its citizens, the state is not adequately represented in a suit which names its officers in an official capacity and purports to ignore the state's existence. It is urged that only the state is so situated so that as a practical matter it can represent the interests adverse to those of the Respondents.

The memorandum decision of the Federal District Court for the District of South Dakota can be distinguished both factually in the nature of the cases at hand and upon the legal precedents cited therein. That decision relies heavily upon these relatively

recent cases as legal precedent which are: *Scheuer* vs. *Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974); *Edelman* vs. *Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); and *Standing Rock Sioux Indian Tribe* vs. *Dorgan*, 505 F.2d 1135 (8 Cir., 1974). The District Court's decision places emphasis on the fact that the only reason intervention was sought was to raise the Eleventh Amendment bar to jurisdiction over a state in Federal District Court. While this purpose by the Petitioner is obvious, there still remains what the Petitioner contends are legal precedents which would allow intervention as a matter of right as the real party in interest and that the effect is only that which the Petitioner has a right to seek. It is necessary, then, to analyze each of these three cases as it relates to the present suit.

Scheuer vs. *Rhodes*, supra, is clearly distinguishable as a suit against named state officials because it is brought against them pursuant to 42 U.S.C.S., Sec. 1983. One need only refer to 42 U.S.C.S., Sec. 1983 to determine that the case at hand does not by its pleadings allege any deprivation of any constitutional rights, privileges or immunities of the Defendants by any employee of the State of South Dakota acting under color of State law. As they are commonly referred to, "1983" actions are those brought pursuant to definite federal legislation which is specifically intended to pierce any defenses available to individuals where one individual has acted under color of state law to deprive another individual of some constitutional right. In other words, 42 U.S.C.S., Sec. 1983 is so designed and has been so treated as a method of recourse against an individual acting under color of state law who has been made answerable in a limited factual circumstance. That factual circumstance is the deprivation of someone's constitutionally guaranteed rights, privileges or immunities. Petitioner submits that the case of *Scheuer* vs. *Rhodes*, supra, is of dubious legal precedent for a case which was not brought as a "1983" action. The cases at hand allege negligence on the part of state employees and not that they acted in violation of 42 U.S.C.S., Sec. 1983 or that

the Respondents were deprived of some constitutionally guaranteed right, privilege or immunity.

Factually, the case of *Edelman* vs. *Jordan*, supra, is also distinguishable. That action sought injunctive and declaratory relief against named state officials for alleged impropriety in disbursement of funds under an aid program. The issue in that case involved payments under a state administered program, who was to receive the funds and when they were entitled to them. Negligence of state employees or agents in the performance of a governmental function was not the issue but rather it was whether or not the individual plaintiffs were entitled to payments at a particular time from the state treasury.

In invoking the Eleventh Amendment bar against a District Court order to disburse retroactive payments, in the *Edelman* case, supra, the United States Supreme Court relied on the decision of *Ford Motor Co.* vs. *Department of Treasury*, 332 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945). That decision held that where the action is in essence one to recover money from the state treasury, it is one against the state. Yet both decisions are distinguishable because the nature of the cases seek monies from the state treasury directly and from funds existing for a specific purpose. Neither seek money as the result of any judgment rendered as the result of a negligence suit or the imposition of vicarious liability upon a sovereignty as the result of alleged negligence by an officer of that sovereignty.

Petitioner would submit that if the test of ultimate payment of funds from a state treasury is to be used, the *Standing Rock Sioux Tribe* case, supra, presents a more accurate precedent applicable to the cases at hand. In the *Standing Rock Sioux Tribe* case the Eighth Circuit Court pointed out that the doctrine of sovereign immunity of the Eleventh Amendment is to be liberally construed. While again the nature of this case was to recover specific tax monies from the North Dakota state treasury, one very important part of that decision was to analyze the constitutional and statutory authority of the

sovereignty to be engaged in the collection and refund of tax monies. Petitioner submits that this same type of consideration should be afforded the State of South Dakota in the present suit.

While it would be unnecessarily repetitious to reiterate prior quotation in their entirety, several cases cited earlier again have a bearing on the nature of the suit as herein brought as it relates to the construction, maintenance and improvement of highways in South Dakota. The South Dakota Constitution, Article XIII, Sec. 9, supra, and South Dakota Compiled Laws 31-4-14, supra, only permits the sovereignty to be engaged in construction and maintenance of highways just as the statutes and Constitution of North Dakota permitted tax refunds only upon authorization of the legislature. Both cases deal with limitations on the function to be performed by an officer or employee of the sovereignty as authorized by that State's Constitution and statutory law. Both cases deal with a legal question of agency, whether directly or indirectly, which addresses the function to be performed and in whose behalf it is performed. As the North Dakota Tax Commissioner acts in an official capacity pursuant to that State's Constitution and Statutes, so does any employee or agent of the State of South Dakota, Division of Highways, act. Petitioner submits that the District Court ignored this relationship in reaching its decision and in doing so ignored the issue of the real party in interest and the real party's rights to protect its interests in the performance of a governmental function of construction and maintaining highways.

CONCLUSION

The Petitioner, State of South Dakota, asserts that it should be allowed to intervene in the cases at hand as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. By meeting those criteria explicitly set forth in Rule 24(a)(2) and in asserting that it is the real party in interest and as such also meets those criteria, this claim is made.

Under the long standing precedent that parties named may be

nominal parties, the Petitioner states that the present suit merits a determination of who is the real party in interest and whether the criteria for intervention have been met. In urging that both of these determinations be made favorable to the Petitioner, the Petitioner points out a distinguishable situation where the functions of constructing and maintaining highways in South Dakota are those constitutionally permitted to be performed only by the state and legislatively delegated to officers and employees thereof. These unique and distinguishing factors both bear upon the question of the real party in interest and the right of intervention.

By an analysis of prior decisions involving the governmental function of constructing and maintaining highways in South Dakota, it is asserted that the cases at hand are in essence the same type of cases which recognize that a suit against officers and employees of the state involved in constructing and maintaining highways is a suit against the sovereign. This analysis is premised not only upon tests set forth in precedent cases, but also upon an analysis of the constitutional, statutory and case law of the domicile as required by Rule 17. Not only is the function of constructing and maintaining highways well defined by statute but also the rights to indemnification from the sovereign are statutorily provided.

The cases at hand name officers, their capacity and their employer. It is asserted that in bringing these suits the Respondents not only acknowledged the disclosure of the agents and employee's capacities, but in doing that, as a matter of substance, brought a suit against the sovereign State of South Dakota. It is asserted that the rules of agency apply to the situation where the sovereign acts as the principal or master and that as such the principal or master is answerable for the acts of his agents or servants. This is especially so where the governmental function of constructing and maintaining highways is explicitly defined in the sovereign's constitution and statutes. Petitioner asserts that on one hand by establishing its position as the real party in interest, it has met the criteria necessary to intervene. On the other hand, the Petitioner asserts

that it also meets the explicit standards of Rule 24(a)(2). The committing of discretionary acts or those outside the scope of employment are not alleged in Respondents' Complaints.

Because the construction and maintenance of highways is the effectuating of a state policy, Petitioner asserts that it has an interest in the subject matter of the suits. Further, because of the constitutional provisions and statutory delegations of authority to its officers and employees, both of which bind the sovereign in performing its function, the state asserts that upon the principles of stare decisis it may as a practical matter be impaired in its ability to protect that interest, that relationship, as a matter of its own law, to which it is bound. It is submitted that adequate representation of those interests is not present in these suits. Rather, because the state represents an overriding and broad interest in how its highways are to be constructed and maintained and because of the governmental nature of those functions, the named Defendants as individuals do not represent that same overriding and broad interest.

Rather than seek declaratory or injunctive relief, or relief provided by a specific statute, or the determination of rights to monies in a state treasury, these suits seek to hold individuals liable for alleged negligence in the official performance of their governmental duties on behalf of the sovereign state of South Dakota. Yet, if the test of recovery of money from the state treasury is to be ultimately applied, Petitioner asserts that a consideration of the constitutional and statutory authority for performing the functions of constructing and maintaining highways, hereinbefore stated, presents a distinguishable legal relationship of those individuals to the sovereignty. Because of this relationship the state is the proper party Defendant.

The Petitioner's position is further supported by the South Dakota law which extends the sovereign immunity of the State to its employees performing their official governmental functions on behalf of the State as shown by cases cited herein. The Respondents' Complaints allege a cause of action in

conflict with South Dakota law and the United States Court of Appeals for the Eighth Circuit has improperly applied South Dakota law in its decision.

WHEREFORE, Petitioner prays a Writ of Certiorari be granted to review the decision of the United States Court of Appeals for the Eighth Circuit and these cases be remanded permitting Petitioner to intervene as the real party in interest.

Respectfully submitted,

STATE OF SOUTH DAKOTA:

WILLIAM J. JANKLOW
Attorney General

BY: CARL W. QUIST
Assistant Attorney General

CAMRON HOSECK
Assistant Attorney General

Attorneys for Petitioner

APPENDIX A

Opinion of District Court

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Lawren V. Schumaker,)
)
Plaintiff)
)
vs.) CIV73-3032
)
Maynard Sommer, Robert N.)
Cable, Henry Greek, Derald D.)
Thompson, Richard McKee and)
Emil Brei,)
)
Defendants)
)
State of South Dakota, Acting)
by and through the Department)
of Transportation for the)
Division of Highways,)
Applicant for Intervention,)

Darlene Schumaker,)
)
Plaintiff)
)
vs.) CIV73-3033
)

Maynard Sommer, Robert N.)
Cable, Henry Greek, Derald D.)
Thompson, Richard McKee and)
Emil Brei,)
)
Defendants)
)
State of South Dakota, Acting)
by and through the Department)
of Transportation for the)
Division of Highways,)
Applicant for Intervention,)

MEMORANDUM DECISION

Mr. Charles Poches, Jr., of Fort Pierre, South Dakota, and Mr. James A. Dumas, of San Pedro, California, appeared in behalf of the plaintiffs; Mr. R.C. Riter, of Stephens, Riter, Mayer and Hofer, and Mr. Warren W. May, of Martens, Goldsmith, May, Porter & Adam, both of Pierre, South Dakota, appeared in behalf of the defendants; Messrs. Carl W. Quist and Camron Hoseck, Assistant Attorneys General, of Pierre, South Dakota, appeared in behalf of the State of South Dakota.

Both of these diversity cases arise from the same event. In August of 1972, the plaintiff in CIV73-3033, Darlene Schumaker, was driving a 1972 Dodge van north on South Dakota highway No. 83, approximately nine miles south of Mission, South Dakota. Her husband, Lawren V. Schumaker. plaintiff in CIV73-3032, was a passenger in the van. Mr. Schumaker in his suit seeks damages for loss of consortium and property loss, while Mrs. Schumaker seeks damages in her suit for personal injuries she sustained, all as a result of a vehicular accident. The Schumakers, citizens of California, allege in their complaints that Mrs. Schumaker lost control of the van, which rolled, as a result of the negligence of the defendants.

The defendants are all citizens of South Dakota, and at the time of the accident at issue were all employees of the South Dakota State Highway Department.[1] The complaint alleges that each of the defendants was negligent in performing their respective responsibilities with regard to the construction, maintenance and improvement of the highway at the location of the accident, and that their negligence caused the accident and the attendant damages suffered by the plaintiffs. Specifically, it is alleged that the defendants had the duty to construct, maintain and improve the highway so as to provide a reasonably safe condition for travel, and that they knew, or with the exercise of reasonable care should have known, that the highway was dangerous to the traveling public. The highway is alleged to have been defective in that at the location of the accident the road, which curves and inclines, is not constructed within the accepted requirements for safe highway travel, and that there is a five inch perpendicular drop from the roadway surface to the adjacent gravel, and that the edge of the roadway is not marked so as to indicate and warn the public of the drop-off at the edge of the pavement and the lack of an adjacent shoulder, and that the center line was painted so as to narrow the lane in which plaintiffs were traveling.

The State of South Dakota was not made a defendant by the plaintiffs. The State has, however, filed a motion to intervene and a motion to dismiss the complaints. The legal issue raised by the State and by the named individual defendants in their answer, is whether a personal injury suit for damages founded on alleged personal and individual negligence in the construction, maintenance and improvement of a highway, against individual employees of the State Highway Department,

1 At the time of the accident, defendant Sommer was acting State Highway Engineer, defendant Cable was State Maintenance Engineer, defendant Greek was District Engineer, defendant Thompson was District Maintenance Engineer, defendant McKee was Maintenance Superintendent, and defendant Brei was foreman of the maintenance crew.

is in reality a suit against the State.[2] If the question raised is answered affirmatively, it would follow that this court lacks jurisdiction by virtue of the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

At one time it was the rule that the amendment applied only in cases in which one of the United States was a named party. Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 857 (1824). However, at this date it is clear that the Eleventh Amendment's jurisdictional bar may be raised where the state "is not a named party but is the real party in interest in an action for the recovery of money against a state official or agency." Standing Rock Sioux Indian Tribe v. Dorgan, No. 74-1119 (8th Cir., November 1, 1974) (slip opinion at page 5); Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974). "Its applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record.' Ex parte New York, 256 U.S. 490, 500 (1921)." Scheuer v. Rhodes, 416 U.S. 232, 237 (1974). The complaints

2 Procedurally it may have been more appropriate for the named individual defendants to raise this question by motion. Technically, the only motion before the court is to intervene. If that were granted, then the State's motion to dismiss would be before the court. However, since the Eleventh Amendment question goes to the subject matter jurisdiction of this court, and partakes sufficiently of a jurisdictional bar, and because the issue was raised in the defendants' answers, it is appropriate that this court reach the merits of the Eleventh Amendment issue, without regard to the intervention question. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). As is made clear by the wording of the State's motion, intervention is sought only for the purpose of raising the Eleventh Amendment.

in the instant cases allege personal negligence on the part of the named defendant state officials or employees. The state is not named as a party defendant, nor does the complaint by its terms seek to impose any liability or obligation upon the state. The state argues, nonetheless, that the "essential nature and effect of the proceeding" makes these cases ones in which the state is the real defendant.

In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Supreme Court held that the District Court erred in dismissing, on Eleventh Amendment grounds, cases brought by the personal representatives of students killed during the Kent State riot. The defendants named in the complaints were the Governor, Adjutant-General, and assistant Adjutant-General, of Ohio, as well as various named and unnamed officers and enlisted men of the Ohio National Guard, and the Kent State University President. The District Court had held that the cases were in essence against the State of Ohio, and thus barred by the Eleventh Amendment. The Court of Appeals affirmed the decision of the District Court, on the same ground and on the alternative ground that executive immunity barred the actions as against the state officials. 471 F.2d 430 (6th Cir. 1972).

The Supreme Court reversed and remanded. The Court recognized that the Eleventh Amendment is a bar to federal jurisdiction in a suit which seeks monetary damages from the state treasury. 416 U.S. at 238. Edelman v. Jordan, *supra*. The *Scheuer* Court held that when a complaint seeks to impose personal and individual liability, the Eleventh Amendment does not bar federal jurisdiction. 416 U.S. at 238.

In Edelman vs. Jordan, *supra*, the Supreme Court reversed that portion of the District Court decree which awarded *retroactive* welfare benefits to the plaintiffs. In ascertaining whether a particular suit is one against the State, the Court focused attention on the question of whether the judgment would expend itself on the state treasury. In *Edelman* it was clear that the District Court's judgment would do precisely that. The Court reached its holding despite the fact that only

individual welfare officials were named defendants, holding that the inevitable effect of the judgment in the lower court would be the depletion of state revenues. 415 U.S. at 668. It was not contemplated in the suit that the retroactive award would be paid by the individual officials.

> While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. 415 U.S. at 668.

The Court in Standing Rock Sioux Indian Tribe v. Dorgan, No. 74-1119 (8th Cir., November 1, 1974), affirmed the lower court's dismissal of an action to recover sales and use taxes illegally collected by North Dakota. In *Standing Rock Sioux Indian Tribe*, as in *Edelman*, the Court placed emphasis on the fact that the relief sought would be paid from the state treasury. In *Standing Rock Sioux Indian Tribe*, again as in *Edelman*, the complaint did not seek to impose personal liability upon the individual defendant. *Scheuer*, *supra*, may be distinguished from both *Standing Rock Sioux Indian Tribe* and *Edelman* on the basis that in *Scheuer* the complaint did seek to impose personal liability upon the individual defendants.

Construing the complaints in these cases before the court most favorably to the pleader, *see, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), it appears that the plaintiffs are seeking to impose personal liability on the named individual defendants for their alleged personal negligence, and are not seeking money damages from the State of South Dakota. It is the opinion of this Court that these cases are not against the State, within the

meaning of the cases discussed *infra*, and accordingly holds that the motions to intervene and to dismiss should be denied.[3] The Court does not separately discuss at length the merits of the motion to intervene, based on the Court's view that intervention had been sought solely for the purpose of raising the Eleventh Amendment issue. Having held that these cases are not against the State, and having recognized that no damage judgment in these cases could run against the State in any event, it is clear to this Court that the motion to intervene should be denied. Further, while it is true that the State has claimed an interest in the subject of this lawsuit, as required by Rule 24(a)(2) of the Federal Rules of Civil Procedure, it is not at all clear that the State has satisfied the other criteria specified in that rule. The Court's disposition of the Eleventh Amendment question casts doubt on the existence of the interest claimed by the State, which of course casts doubt on the viability of the State's claim that it is so situated that the disposition of this action may impair or impede the State's ability to protect its interest. In addition, it appears to the Court that the interest of the State, assuming for the moment that the State has an interest within the meaning of Rule 24(a)(2), is adequately represented by the present party defendants. The present defendants surely have just as much interest in avoiding liability in this suit as the State would have were the State a party.

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3 The Court is of course aware that the brief submitted by the parties in these cases discussed at some length the doctrine of governmental immunity for government officials and employees, as well as possible waiver of that immunity. However, this Court is convinced that the Eleventh Amendment question which was the issue raised by the motion to dismiss, is a question different than that involved in governmental immunity for employees. Edelman v. Jordan, 415 U.S. 651 (1974), discussed in the body of this opinion, clearly delineates the two issues. Whether a particular employee or official should be entitled to immunity turns on the factual nuances peculiar to that individual within the context of the particular conduct and event drawn into question. Such a determination may be ripe on a motion for summary judgment, after appropriate affidavits or depositions are available, or may only be determinable at the trial on the merits. Clearly, a determination requiring close scrutiny of factual details is not appropriately decided on a motion to dismiss.

Counsel for the plaintiffs will prepare an order denying the motion to intervene and the motion to dismiss.

Done and entered at Sioux Falls, South Dakota, this 16th day of December, 1974.

BY THE COURT:

/S/ FRED J. NICHOL
Chief Judge

APPENDIX B

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 75-1070 and 75-1071

Lawren V. Schumaker and Darlene Schumaker, Plaintiffs-Appellees,	*	
v.	*	Appeal from the United States District Court for the District of South Dakota
Maynard Sommer, Robert N. Cable, Henry Greek, Derald D. Thompson, Richard McKee and Emil Brei, Defendants,	*	
and	*	
State of South Dakota, Acting by and through the Department of Transportation for the Division of Highways, Applicant for Intervention, Appellant.	*	

Submitted: June 10, 1975
Filed: June 19, 1975

Before GIBSON, Chief Judge, BRIGHT, Circuit Judge, and KILKENNY, Senior Circuit Judge.*

*The Honorable John F. Kilkenny, United States Senior Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM.

The State of South Dakota appeals the denial of its application to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) in two pending lawsuits seeking damages for the individual negligence of state employees.[1] It is undisputed and admitted that intervention was sought for the purpose of moving to dismiss the lawsuits on the ground of sovereign immunity, it being the State's contention that it is the real party in interest and that its sovereign immunity shields its employees from their personal negligence while performing official duties.

A reading of the pleadings reveals, however, that no damages are being sought against the State. Rather, the complaints seek to impose liability upon the named defendants solely for their personal and individual negligence. The State, in maintaining that it is the real party in interest, is attempting to extend the concept of sovereign immunity to immunize its agents from liability for their personal negligence. This is not the law of South Dakota. *See, e.g., Loonan Lumber Co. v. Wannamaker,*

[1] The Honorable Fred J. Nichol, Chief Judge of the United States District Court for the District of South Dakota, denied this application in an unreported memorandum decision filed December 16, 1974.

81 S.D. 51, 131 N.W.2d 78 (1964), an action for personal negligence. The South Dakota Supreme Court therein stated:

> It is not the contract of the master with the servant which exposes the servant to, or protects him from, liability to third persons and liability does not arise from the master-servant relationship. The servant's liability arises from his breach of a duty owed to a third person under the law, or, as sometimes said, from the servant's common-law obligation to use that which he controls as not to injure another.

81 S.D. at , 131 N.W.2d at 79.

The State's arguments are untenable in this case and are disposed of by Judge Nichol's well-reasoned memorandum decision. The application for intervention as a matter of right was properly denied by the District Court and its order is hereby affirmed on the basis of its memorandum decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.